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No. 99-1850

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,

*Petitioners*,

—v.—

JOHNSON & JOHNSON, *et al.*,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION

FRANCIS X. DEE
*Counsel of Record*
STEPHEN F. PAYERLE
CARPENTER, BENNETT & MORRISSEY
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4079
(973) 622-7711

*Counsel for Respondents*

24pp

## RESTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that petitioners had failed to establish claims of age discrimination where they were not treated adversely to younger employees and, instead, were given an additional option not available to younger employees to receive enhanced benefits in addition to their vested pension benefits?

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties are listed in the Petition at pp. iii-vi, except that Vanita Kadam as the administrator of the Estate of Manohar Kadam was substituted for Manohar Kadam. Respondent Johnson & Johnson has no parent corporation, and there is no corporation owning 10% or more of its stock. Johnson & Johnson subsidiaries and affiliates are also named as parties, as identified in the Petition at pp. iii-vi. No other corporation is a parent or owns 10% or more of the stock of those subsidiaries and affiliates.

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## BRIEF IN OPPOSITION

## OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit is unreported. It is reprinted at App. 1-20. The opinions of the United States District Court for the District of New Jersey granting summary judgment are unreported and are reprinted at App. 24-31 and 39-43. The opinion of the District Court denying class certification is unreported and reprinted at App. 32-38.

## JURISDICTION

The judgment of the Court of Appeals was filed on October 20, 1999. (App. 16-17). Petitioners filed a petition for rehearing or rehearing *en banc* on November 2, 1999. That petition was denied by the Court of Appeals by Order entered on December 30, 1999. (App. 19).

By Orders entered March 1, 2000 and April 12, 2000, this Court granted petitioners' applications for extensions of time to file their petition for writ of certiorari. The second extension was to May 16, 2000.

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted at App. 130-37.

## STATEMENT OF THE CASE

### A. Introduction

Petitioners' claims arise from their elections to participate in a voluntary early retirement program offered by their employer as part of a reduction in force. Under that program, each petitioner agreed to voluntarily retire in exchange for a substantial benefit package to which he or she had no prior entitlement or right. (App. 8; J.A. 330, 364-67, 577-78). Petitioner Muscarella, for example, received enhancements to his pension with a present value that exceeded $170,000 (over and above his accrued and vested pension), plus a "Service Benefit" equal to $67,800, plus retiree medical and life insurance benefits to which he otherwise was not entitled. Because they elected to retire under the enhanced benefit program, petitioners were not eligible to also receive severance benefits, which were worth substantially less than the enhanced benefits they received. (App. 9, 11). Petitioners' accrued and vested pension

benefits were not affected by their elections. (App. 14). Their accrued and vested benefits were not offset by or used to offset any other benefits. (*Id.*)

Petitioners claimed that the denial of severance benefits violated ERISA. Further, although petitioners received substantially greater benefits than did younger employees, they claimed age discrimination in violation of the ADEA as amended by the OWBPA.

### B. Petitioners' Employment and the Closing of Their Department

Petitioners were employed by McNeil-PPC, Inc. ("Personal Products Company" or "PPC"), a subsidiary of Johnson & Johnson, until they retired on December 1, 1993. (App. 7). Until October 30, 1993, petitioners worked in PPC's engineering department. (J.A.54, 117). On August 20, 1993, PPC announced that its engineering department would be closed on October 30, 1993. (J.A.69-70). As a result, all positions in the department, including plaintiffs' positions, were scheduled to be eliminated on October 30, 1993. (*Id.*) Several employees were transferred to or obtained positions in other departments or companies affiliated with PPC. (J.A.92). Petitioners similarly had the opportunity to obtain other positions, and, thereby, continue their employment.

The District Court and a jury rejected petitioners' claims of age discrimination (and discrimination on other grounds) in connection with the elimination of their positions. (J.A.602, 641). Petitioners did not appeal from the court's rulings or the jury's findings in these respects.

### C. VEREP

On September 1, 1993, shortly after the closing of its engineering department was announced, PPC announced that it would participate in VEREP, short for the Voluntary Early Retirement Enhancement Program. (J.A.71, 330, 387).

VEREP was a limited duration program, available only in the late Summer and Fall of 1993. (J.A.387, 503). It offered eligible employees a one-time opportunity to voluntarily retire with enhanced benefits. (*Id.*) To be eligible for VEREP, employees were required to be actively employed, meet certain service requirements, and have attained age 50. (J.A.71, 390, 503). Employees who elected to participate in VEREP agreed to voluntarily retire on December 1, 1993. (J.A.391, 503).

VEREP provided three separate benefits or benefit enhancements to participants. First, it gave participants an additional five years of age and an additional three years of credited service for pension purposes under the pension plan, thereby significantly enhancing their pension benefits under that plan. (J.A.330, 387, 503). This allowed participants who were between ages 50 and 55 to obtain an immediate pension, which ordinarily was not available until at least age 55. (*Id.*, Ja410, 441). Also, the addition of years of service and age to the pension formula increased the amount of a participant's pension above and beyond his or her accrued and vested benefit. (J.A.330, 387, 410, 440, 442). This increase was substantial. For example, for a participant who was 55 years of age with 20 years of service, VEREP's addition of three years of service increased his or her pension by 15% and VEREP's addition of five years of age increased his or her pension by another 28%—both in addition to the individual's previously accrued and vested benefit. (J.A.410, 440, 442; see also Ja220-22).

Second, VEREP made participants immediately eligible for retiree medical and life insurance benefits. (J.A.330, 387).

Third, VEREP provided what it called a "Service Benefit." (J.A.330-31, 387, 503). The Service Benefit was equal to the benefit provided under the Severance Plan—two weeks of regular base pay for each full year of service. (*Id.*)

Further, at the employee's election, the VEREP Service Benefit was paid by monthly payments equal to the individual's monthly salary, thereby effectively continuing that salary for a period after termination. (J.A.397, 504).

### D. Petitioners' Elections to Participate in VEREP

Petitioners each elected to participate in VEREP and retired from employment on December 1, 1993. (J.A.330, 364-67, 577-78).

As noted, VEREP was only available to active employees. (J.A.387). Petitioners were still active employees during the VEREP election period, which preceded the October 30, 1993 closing of the engineering department. (*Id.*) After the department closed and petitioners' positions were eliminated on October 30, 1993, each petitioner's employment continued until he or she retired on December 1, 1993. (J.A.161, 167, 190). By contrast, other persons affected by the closing of the engineering department who were not eligible for VEREP or who did not find other positions were terminated from employment on October 30, 1993. (J.A.70).

As a result of their elections to retire under VEREP, each petitioner received the substantial VEREP benefits and benefit enhancements he or she otherwise could not have received. These benefits included the Service Benefit, which benefit alone was equal to Severance Plan benefits. (App. 8-9, 10-11; J.A.331).

### E. Severance Plan

The Severance Plan in which Personal Products Company participated was established by Johnson & Johnson and administered by the Pension Committee of the Board of Directors of Johnson & Johnson. (J.A.109, 112). The Severance Plan provided severance pay to eligible participants, generally in the amount of two weeks of salary for each year of credited service. (J.A.113d, § 5.1).

The Severance Plan provided benefits in the event of certain involuntary terminations of employment. Section 4.1(a) of the Plan defines the "Severance Events" triggering eligibility for severance benefits:

> [A] participant shall be eligible for the benefits provided in Article 5 if his or her employment with the Company is involuntarily and permanently terminated as the result of any one of the following events:
>
> i. Position elimination;
>
> ii. A participant's inability to meet the requirements of his or her position;
>
> iii. Reduction in force, or
>
> iv. For such other reasons as the Pension Committee may, in its sole discretion, deem appropriate.

(J.A.113b, § 4.1(a)). Section 4.1(b) then sets forth disqualifying events:

> A participant is not eligible for the benefits provided in Article 5 if his or her employment is terminated as a result of any one of the following events:
>
> * * *
>
> ii. Retirement (except that a Participant whose employment is terminated as a result of an event listed in Article 4.1(a) and who elects to retire under a retirement plan of the Company shall be granted severance pay hereunder);
>
> * * *
>
> viii. Such other reasons as the Pension Committee shall, in its sole discretion, determine to be cause for denying benefits under the Plan.

(J.A.113b-c, § 4.1(b)).



As reflected in Sections 4.1(a)(iv) and 4.1(b)(viii), the Severance Plan conferred broad discretion on the Pension Committee not only to interpret the Plan and its eligibility provisions, but also to impose additional conditions of eligibility or disqualification not set forth in the Plan. Section 4.3 of the Severance Plan confirmed the Pension Committee's discretion both to interpret and impose eligibility conditions:

> The Pension Committee shall, in its sole discretion, determine whether or not a Severance Event has occurred with respect to a Participant and may impose such other eligibility conditions on payment of benefits hereunder as it may deem advisable. The Pension Committee shall have absolute discretion in interpreting and applying the terms of this Plan.

(J.A.113c, § 4.3).

In addition, Section 5.1(d) of the Severance Plan gave the Pension Committee discretion to offset Severance Plan benefits by any payment under any other plan or other source that the Pension Committee deemed to be "similar":

> The Pension Committee may, in its sole discretion, authorize a reduction in severance pay to a Participant hereunder by the amount of any discharge, dismissal, or severance allowance or similar payment to which the Participant is or shall be entitled by reason of any law, regulation, ruling, legal proceeding, other Plan of the Company, or other plan to which the Company directly or indirectly contributes, to the extent such amount is not attributable to the Participant's own contributions.

(J.A.113d, § 5.1(d)).

Eligible PPC engineering department employees also were offered the opportunity to participate in a special separation pay program applicable to the department closing. That program provided greater separation pay than was provided

under the Severance Plan, in exchange for a release of all claims. (J.A.331, 368-71). None of the petitioners elected to participate in that program. (*Id.*)

### F. Plaintiffs' Claims for Severance Pay

After retiring under VEREP, petitioners sought severance benefits under the Severance Plan. (J.A.372, 373, 376, 581). Their applications were denied by the plan administrator on the grounds that they were not eligible because of their participation in VEREP. (*Id.*, Ja378-79, 379-80, 580).

Following petitioners' requests for further review of their claims, they filed their respective complaints starting this action. Other than the four petitioners, no individuals in any Johnson & Johnson company who elected to participate in VEREP applied for Severance Plan benefits. (J.A.225, 229, 232, 235, 237, 240, 242, 251, 253, 255).

### G. Decisions Below

The Court of Appeals affirmed the District Court's judgment, on defendants' motion for summary judgment, that the denial of petitioners' applications for severance benefits did not violate ERISA, the ADEA, or the New Jersey Law Against Discrimination. (App. 15). With respect to the ERISA claims, the Court of Appeals noted that § 5.1(d) of the Severance Plan reserved to the plan administrator the discretion to reduce any severance benefit by the amount of any "similar payment" to which a participant might be entitled. (App. 7, 11). The court then found that Severance Plan benefits and VEREP's Service Benefit were substantially similar in nature and amount. (App. 11). Therefore, the court concluded, the plan administrator properly exercised its discretion under § 5.1(d) to determine that petitioners were not entitled to any additional benefits under the Severance Plan. (*Id.*)

On petitioners' discrimination claims, the Court of Appeals agreed with the District Court that it was not necessary to reach the "safe harbors" or "affirmative defenses" established by OWBPA because the petitioners had not established *prima facie* cases of age discrimination. (App. 15). The court noted that OWBPA "did not change the fundamental tenet of any discrimination claim—that an employer treat members of the protected class (here, those over the age of forty) adversely." (App. 12). The court found that, in this case, the petitioners were not treated adversely to younger employees. First, the court observed,

> the named plaintiffs, and others over the age of fifty, were treated *more* favorably than their younger counterparts insofar as they were given a choice between two different options; one that provided benefits identical to those employees and another that provided *greater* benefits than were given to younger employees.

(App. 12; emphasis added). Second, the court noted that petitioners' claims did not implicate vested benefits: "Johnson & Johnson did not deduct *vested* severance benefits from *vested* pension benefits." (App. 14; emphasis in original). Instead, the court determined that petitioners were merely given an option of electing enhanced benefits unavailable to younger employees, such that "older employees were indeed the favored class." (*Id.*) The court then held that it was not necessary to reach the affirmative defenses regarding benefits established by OWBPA because "plaintiffs have not met their initial burden to prove adverse treatment" to establish a *prima facie* claim of discrimination. (App. 15).

The Court of Appeals did not review the District Court's denial of class certification, finding that it was mooted by the affirmance of the dismissal of the petitioners' claims. (App. 15). The District Court had denied class certification as to the ERISA claims based on its determination that petitioners' claims were not typical of any claims that might be

asserted on behalf of a proposed class and that the petitioners were not adequate representatives of the proposed class. (App. 35-37). The District Court relied primarily on the fact that, unlike the petitioners, none of the proposed class members had applied for severance benefits; therefore, the proposed class claims would be subject to a substantial defense not applicable to the petitioners' claims. (*Id.*) In addition, the court found that petitioners and the proposed class members were not similarly situated. (App. 37-38). The proposed class was fractured by significant differences and individual questions of fact. These questions included whether individuals retired under the VEREP program, and whether individuals were subject to a position elimination or reduction-in-force at the time they elected to retire. Other issues depended on an individual's salary, years of service, and age at the time of his or her separation from employment, such as whether the individual received an "unreduced" pension permitting offset under 29 U.S.C. § 623(l)(2)(A)(ii) or whether any severance pay would be offset by the value of health benefits under 29 U.S.C. § 623(l)(2)(A). Therefore, the District Court denied class certification as to all claims.

## REASONS FOR DENYING THE WRIT

### A. The Primary Question that Petitioners Seek to Present Was Not Reached by the Courts Below, Is Not the Subject of a Conflict, and Presents No Other Basis for Review by this Court.

The primary question presented in the Petition concerns amendments to the ADEA by OWBPA setting forth affirmative defenses for the offset or reduction of employee benefits that otherwise would violate the ADEA. The Third Circuit held that these affirmative defenses did not have to be addressed in this case because the petitioners had not

established initial cases of discrimination. (App. 15). The court's decision follows the similar conclusion of the Court of Appeals for the District of Columbia Circuit in *May v. Shuttle, Inc.*, 129 F.3d 165, 174-75 (D.C. Cir. 1997). There is no conflict on this issue, and petitioners point to none.

As the court below observed, the OWBPA provisions on which petitioners seek to rely are affirmative defenses or "safe harbors." (App. 15). *Accord Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997). These provisions do not set forth prohibitions. Instead, as the statutory language itself makes clear, they define certain conduct that is lawful notwithstanding that it might otherwise violate other sections of the ADEA. 29 U.S.C. § 623(f)(2) ("It shall not be unlawful for an employer to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section. . . ."); 29 U.S.C. § 623(1)(2)(A) ("It shall not be a violation of subsection (a), (b), (c) or (e) solely because. . . .").

Thus, there is no need to reach these affirmative defenses unless the challenged action otherwise would violate the ADEA, that is, that the action discriminates against the plaintiff on the basis of age. This was the structure of 29 U.S.C. § 623(f)(2) before the OWBPA amendments in 1990. *See Public Employees v. Betts*, 492 U.S. 158, 161, 165-66 (1989); *E.E.O.C. v. Westinghouse Elec. Co.*, 869 F.2d 696, 706-09 (3d Cir. 1989), *vacated* (in light of *Betts*), 493 U.S. 801 (1989) (addressing the pre-OWBPA 29 U.S.C. § 623(f)(2) "defense" only after finding a *prima facie* case of age discrimination). OWBPA maintained this structure in 29 U.S.C. § 623(f)(2) and the additional defenses added in 29 U.S.C. § 623(l). As the regulation adopted in the OWBPA amendment to 29 U.S.C. § 623(f)(2) recognizes:

> As [the] statutory text makes clear, the section 4(f)(2) exception [29 U.S.C. § 623(f)(2)] is limited to otherwise discriminatory actions. . . .

29 CFR § 1625.10(c). The Third Circuit's determination in this respect is consistent with the decision of the Court of Appeals for the District of Columbia Circuit in *May v. Shuttle, Inc.*, *supra*, which, in a similar situation, did not reach the OWBPA affirmative defenses because the plaintiffs had not established a *prima facie* violation of the ADEA.

Because the courts below held that petitioners were not treated adversely on the basis of age, they did not need to address the OWBPA affirmative defense to age discrimination claims. Therefore, the Petition does not properly present the question of how those defenses should be interpreted or applied.

Further, there is no basis for this Court to review the determination that the petitioners in this case were not treated adversely on the basis of age. That determination was based on the applications of established principles of the elements of a *prima facie* case of age discrimination to the specific facts of this case. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (U.S., June 12, 2000).

In any event, the determination by the Court of Appeals was correct. Under the ADEA, an age discrimination claim requires adverse treatment based on age. 29 U.S.C. § 623(a). There is no actionable age discrimination without adverse treatment—that is, the treatment of older workers less favorably than younger workers. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-11 (1993).

In this case, the facts are that petitioners were not treated adversely to younger employees. Instead, petitioners' complaint is that they should have received something unavailable to any other employee, younger or older: both enhanced benefits under VEREP, including a Service Benefit, *and* Severance Plan benefits. Petitioners were not in any way required to choose between their vested pension benefits and Severance Plan benefits. To the contrary, each petitioner

could have elected to receive both undiminished Severance Plan benefits and, at any eligible retirement age, his or her full vested pension benefits without any offset between the two. *No younger employee was entitled to more.* Petitioners also were given an additional choice not available to younger employees: to elect to continue employment for another month and then to receive VEREP's enhanced benefits—to which they had no pre-existing right or entitlement. If petitioners had chosen Severance Plan benefits, they would have received everything eligible younger employees received: Severance Plan benefits and vested pension benefits without any offset. By choosing VEREP, petitioners received even more: a Service Benefit (equal to Severance Plan benefits) and vested pension benefits, *plus* substantial pension enhancements and health insurance benefits without any offset.

In a similar situation, the Court of Appeals for the District of Columbia Circuit likewise held that there was no age discrimination. In *May v. Shuttle, Inc.*, *supra*, the defendant offered severance pay to workers who were furloughed as part of a reduction-in-force; however, it offered furloughed workers over age 55 "a choice of either a retirement package [with enhanced benefits] or severance pay." 129 F.3d at 174. The plaintiffs claimed that the denial of severance pay to those who elected the retirement package violated the ADEA, since all younger workers who were furloughed received severance pay. The court noted the defendant's point that, compared to younger employees, plaintiffs "were given the option of taking the same exact thing (furlough and severance pay) or a better option (retirement and benefits)." *Id.* at 174-75. The court then rejected the plaintiffs' ADEA claims for the same reasons expressed by the Third Circuit in this case:

> Plaintiffs' only evidence of age discrimination in the retirement option matter is that retirement eligible

> employees received a choice and younger employees did not. . . . [Plaintiffs] have presented no evidence that they were treated less favorably than younger employees.

*Id.* at 175. Like the court in this case, the court in *May* did not need to reach the OWBPA affirmative defenses because there was no *prima facie* violation of the ADEA.

This analysis is consistent not only with the fundamental principles of the ADEA and the fact that the OWBPA provision regarding benefits are stated as affirmative defenses, but also with the concerns that motivated the amendment of 29 U.S.C. § 623(f)(2) by OWBPA. Those concerns focused on the offset of severance benefits by vested pension benefits. The Senate Report to the bill, for example, stated that offsets involving pension benefits present special concerns because such benefits are vested: "*pension benefits are special under federal law*" because pension benefits, "[u]nlike severance (or other benefits) . . . are protected through statutory vesting provisions" under ERISA. Senate Report at p. 23, 1990 U.S.Code & Ad. News at 1528-29 (emphasis in original). The Report cites the example of an older employee who, after being forced to retire upon a plant closing, received less severance pay than younger workers because his severance pay was offset by the present value of his *vested* pension; younger workers, by contrast, received full severance pay plus, when they eventually retired, the full value of their vested pension. *Id.* That is not what happened here.

The dispositive point remains that no petitioner or other employee, younger or older, was required to choose between vested pension benefits and severance pay. Petitioners' only choice involved a special, one-time only enhanced benefit program to which they had no pre-existing entitlement and that was unavailable to younger employees. Petitioners thus were given the choice to receive everything any younger

employee could receive (severance pay and vested pension benefits) or something more (VEREP benefits, including the Service Benefit, plus vested pension benefits). Because petitioners were not treated adversely, their ADEA claims were correctly dismissed as a mater of law.

Even if it were necessary to reach the OWBPA affirmative defenses in this case, resolving petitioners' claims would the require resolving issues not addressed by the courts below. For example, one of the safe harbors in the OWBPA amendment to the ADEA specifically allows the offset of severance benefits by the value of retiree health insurance benefits. 29 U.S.C. § 623(l)(2)(A). The criteria of that provision are met here: under VEREP, petitioners received health benefits and became eligible for an immediate pension following a contingent event unrelated to age. (As noted, a jury and the District Court found that there was no age discrimination in connection with the elimination of petitioners' positions). For purposes of offsetting severance benefits, the value of unlimited duration health benefits when petitioners retired was $59,380.00. *See* 29 U.S.C. § 623(1)(2)(E)(ii) and (iii); *Statistical Abstract of the United States* no. 748 (U.S. Dept. of Commerce 1994) (reflecting a 23.7% increase in the medical component of the CPI from 1990 to 1993). Even as reduced to reflect an actuarial reduction for early retirement, 29 U.S.C. § 623(1)(2)(B), the value of the health benefits received by petitioners completely or substantially offsets their claims for severance pay.

### B. The Remaining Questions Stated in the Petition Fail to Present any Legal Issue or Otherwise Are Not Properly Presented

The remaining questions stated in the Petition do not even frame genuine issues. Petitioners' "Question 1" appears merely to restate, in general terms, their "Question 3," addressed in the prior point of this response, concerning the

applicability of the OWBPA affirmative defenses to the facts of this case. The predicate of "Question 2" is contrary to the jury's finding rejecting petitioners' claims of age discrimination in connection with the elimination of their positions and termination of employment. "Question 5," concerning liquidated damages, is not an issue: no violation of the ADEA was found and, therefore, nothing about liquidated damages was raised to or addressed by the courts below.

The first part of "Question 4," as stated in the Petition, appears to be that if the denial of plaintiffs' applications for severance benefits violated the ADEA, it would also violate ERISA. Thus, it depends on "Question 3," already addressed. Petitioners apparently have abandoned the argument, addressed and rejected by the Court of Appeals, that there was some independent violation of ERISA. In any event, the decision below on this point was based on established principles applicable where, as here, a plan document reserves discretion to the plan administrator. (App. 10). *See Firestone Tire & Rubber co. v. Bruch*, 489 U.S. 101, 115 (1989). There is no basis for review by this Court.

The second part of "Question 4" challenges the District Court's exercise of discretion in denying class certification as to the ERISA claim. There is no basis for review by this Court. The Court of Appeals did not even reach the issue of class certification, since it was mooted by the dismissal of petitioners' claims. Further, the District Court's exercise of discretion was based on the application of established principles to the facts and issues presented in this case. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The Petition does not present a question on which there is a conflict or other grounds for review.

## CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. DEE
*(Counsel of Record)*
STEPHEN F. PAYERLE
CARPENTER, BENNETT & MORRISSEY
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-7711

*Counsel for Respondents*

Dated: June 15, 2000